U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 13 2007

SRC 06 26452230

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, approved the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on certification. The director's decision will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), which includes aliens of exceptional ability and members of the professions holding an advanced degree. Initially, counsel asserted that the petitioner was an alien of "extraordinary ability" (a separate classification pursuant to section 203(b)(1)(A) of the Act), but in response to the director's notice of intent to deny, counsel asserts that the petitioner is an advanced degree professional.

The petitioner left blank part 6 of the petition, which asks for basic information about the proposed employment. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree and that the petitioner had established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The director certified the decision to this office pursuant to the regulation at 8 C.F.R. § 103.4. Pursuant to the regulation at 8 C.F.R. § 103.4(a)(2), the director gave notice to the petitioner that he could file a brief with this office within 30 days. The director dated the decision January 12, 2007. As of this date, more than 30 days later, this office has received nothing further. For the reasons discussed below, we remand the matter for an inquiry as to whether the petitioner's future employment will provide benefits that are national in scope.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The petitioner holds a Bachelor of Medicine and Surgery from the All India Institute of Medical Sciences, found to be equivalent to a U.S. medical degree. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Initially, counsel cited the precedent decision relating to section 203(b)(2)(B)(i), *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), and asserted that the petitioner meets the requirements set forth in that decision. The petitioner, however, is a physician and the final exhibit is labeled, "Evidence of National Shortage of Specialists in the Field & National Importance."

The director concluded that the petitioner sought a national interest waiver based on service in an underserved area pursuant to section 203(b)(2)(B)(ii) of the Act and concluded that the petitioner had not complied with the regulations implementing that section, set forth at 8 C.F.R. § 204.12. Thus, on December 8, 2006, the director issued a notice of intent to deny. In response, counsel asserted that the petitioner was not seeking the waiver as a physician proposing to work in an underserved area pursuant to section 203(b)(2)(B)(ii) of the Act, but under the more general provision at section 203(b)(2)(B)(i) of the Act.

The director concluded that nothing in the law precludes a physician from seeking a waiver under the more general provisions of section 203(b)(2)(B)(i) of the Act. The director then listed the three elements set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217-218. The director, however, then focused solely on the third element.

In general, neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest

by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. at 217-218, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The national interest waiver hinges on *prospective* national benefit. In evaluating this issue, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. Thus, an examination of the alien's past record is useful in projecting future benefit. Nevertheless, Citizenship and Immigration Services (CIS) must also review the alien's proposed future work. In other words, a past record of achievement is not necessarily sufficient if the alien's proposed future employment has a different focus.

We concur with the director's implication, by approving the petition, that the alien works in an area of intrinsic merit, pulmonary and critical care medicine. Our review of the record, however, raises concerns regarding whether the petitioner's future employment will provide benefits that are national in scope. Previously, the petitioner performed clinical research at the St. Elizabeth Health Center in Youngstown, Ohio, and at the Baylor College of Medicine in Houston, Texas. In his curriculum vitae, the petitioner lists his roles at these hospitals as including significant physician duties. The petitioner also, however, indicated that he presented the results of studies at national and international meetings while at the St. Elizabeth Health Center and that he performed similar duties, including designing a study protocol, while at the Baylor College of Medicine. The petitioner lists no research duties among his various roles in his current position as Chief of Pulmonary and Critical Care Medicine at LRG Healthcare in New Hampshire. While some of the petitioner's articles are recent, they relate to research

he performed at the Baylor College of Medicine. While counsel and the petitioner, in his curriculum vitae, both reference ongoing research, that research is ongoing at the Baylor College of Medicine, where the petitioner no longer works. Thus, the petitioner has not established that his future employment includes a significant amount of research. Rather, his current and proposed future duties appear limited to managerial and practicing physician responsibilities.

In considering whether the petitioner's duties as a manager and physician will have benefits that are national in scope, the director should consider the following language:

> [T]he analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3

Significantly, Congress enacted section 203(b)(2)(B)(ii) of the Act for a select category of physicians **after** *Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 215 was issued as a precedent decision. By enacting that law, Congress identified the only category of physicians entitled to a waiver of the alien employment certification process based solely on their work as physicians. We cannot presume that Congress intended special consideration for any other class of physicians. The petitioner has declined to comply with that provision and does not claim to fall within the category of eligible physicians identified by Congress. Thus, the petitioner must establish that the proposed benefits will be national in scope as contemplated by the above language.

Regarding the final element of *Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 218, the director concluded generally that the petitioner presents "a national benefit so great as to outweigh the national interest inherent in the labor certification process." The director based this conclusion on the following analysis of the record:

> A review of the record reveals that the petitioner has acquired an amount of experience in medicine and teaching to be considered of greater value than a United States physician with the minimum of a Doctorate of Medicine. Additionally, support

letters and testimonials in the record substantiate an undue burden that would be imposed if the petitioner were required to undergo the labor certification process.

With regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/alien employment certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 222. Moreover, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

Rather, at issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, the director should consider that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Therefore, this matter will be remanded for the purposes of requesting evidence as to how the petitioner's proposed future employment will be national in scope and a consideration of the petitioner's past record under the proper standards. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.